



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AO03

Autopsies at VA Expense

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulation that governs the performance of autopsies on veterans. The proposed rule would correct a cross-reference to VA regulations that authorize certain outpatient and ambulatory care. The proposed rule would also clarify that consent for an autopsy will be implied if 6 months has passed since the decedent's death and there are no objections from the decedent's surviving spouse or next of kin. The proposed rule would also modify current regulations to make the laws of the jurisdiction in which the autopsy will be performed the controlling laws for purposes of determining who has authority to grant permission for the autopsy. The proposed rule would also clarify the authorized purposes of a VA autopsy. Lastly, the proposed rule would clarify that the authority to order an autopsy includes transporting the body at VA's expense to the autopsy facility.

DATES: Comments must be received by VA on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through www.regulations.gov; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AO03, Autopsies at VA Expense.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420; (202) 461-1599. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Pursuant to 38 CFR 17.170, under certain specified circumstances, “[t]he Director of a [VA] facility is authorized to cause an autopsy to be performed on a veteran who dies outside of a [VA] facility while undergoing post-hospital care under the provisions of 38 U.S.C. 1712 and 38 CFR 17.93.” When this regulatory provision was originally promulgated, 38 U.S.C. 1712 served as the authority for certain outpatient and ambulatory care and, therefore, it also served as the authority for our post-hospitalization autopsy regulation. However, in

1996, section 1712 was amended by the Veterans' Health Care Eligibility Reform Act of 1996, Public Law 104-262, sec. 101. The amendment moved from section 1712 to 38 U.S.C. 1710 the authority to provide outpatient and ambulatory care. In accordance with that amendment, VA promulgated 38 CFR 17.38, on October 6, 1999, 64 FR 54212. Section 17.38, inter alia, implemented the revised statutory authority, in 38 U.S.C. 1710, that authorizes VA to provide hospital and outpatient care to veterans.

We also note that 38 U.S.C. 1703 authorizes VA under specified circumstances to contract with non-VA facilities to furnish hospital care and medical services to certain veterans in non-VA facilities. VA implemented this authority with respect to individuals who died while receiving hospital and medical care in non-VA facilities in 38 CFR 17.52. Limiting autopsies to individuals who are only receiving VA medical care under § 17.38 would exclude the individuals who are receiving fee-basis care under § 17.52, and would, therefore, be inconsistent with current § 17.170. This proposed rule would update the statutory and regulatory cross-references in § 17.170 accordingly. These are overdue technical revisions that would not affect VA's authority to authorize autopsies.

38 CFR 17.170(a), (b)

This rulemaking would also amend current paragraphs (a) and (b) of § 17.170 by reorganizing and clarifying the provisions governing whether an autopsy should be performed. Current paragraphs (a) and (b) state:

(a) Except as provided in this section, no autopsy will be performed by the Department of Veterans Affairs unless there is no known surviving spouse or known next of kin; or without the consent of the surviving spouse or, in a proper case, the next of kin, unless the patient or domiciled person was abandoned by the spouse, if any, or, if no spouse, by the next of kin for a period of not less than 6 months next preceding death. Where no inquiry has been made for or in regard to the decedent for a period of 6 months next preceding his death, he or she shall be deemed to have been abandoned.

(b) If there is no known surviving spouse or known next of kin, or if the decedent shall have been abandoned or if the request is sent and the spouse or, in proper cases, the next of kin fails to reply within the reasonable time stated in such request of the Department of Veterans Affairs for permission to perform the autopsy, the Director is hereby authorized to cause an autopsy to be performed if in the Director's discretion he or she concludes that such autopsy is reasonably required for any necessary purpose of the Department of Veterans Affairs, including the completion of official records and advancement of medical knowledge.

Current paragraphs (a) and (b) use the term “abandoned” to effectively establish implied consent for an autopsy on the part of a known surviving spouse or next of kin and to effectively establish that there is no surviving spouse or next of kin to provide consent in cases where VA is unaware that such a person exists. This proposed rule would be clearer, and would retain the same substantive meaning, if it was revised to avoid using the term “abandoned.” We would state in new paragraphs (a)(2)(ii) and (iii), respectively, that VA is authorized to perform an autopsy if a known surviving spouse or next of kin has either not responded to a VA request for permission or has not inquired

as to the decedent for a period of 6 months prior to death. This would accomplish the same effect as the current language, but would do so in plainer, more direct language. We would also clarify that the consent to grant an autopsy is either directly granted by the surviving spouse or next of kin, or the consent is implied. The implied consent gives VA the authority to perform an autopsy in situations where there is no known surviving spouse or next of kin, where the known surviving spouse or next of kin has not inquired as to the decedent for a period of 6 months prior to death, or where such persons have not responded to VA's request for permission to perform an autopsy. This clarifying language allows for ease of interpretation of the methods used to obtain consent for autopsy.

We also propose to state that the surviving spouse/next of kin must respond to VA's request for authorization to perform an autopsy "within a specified period of time" rather than within a "reasonable time stated in such request." Such requests clearly specify the applicable time period, which is typically short and based on the specific facts concerning the decedent's body and/or cause of death. There is no reason to include a "reasonable" modifier in these situations; it is more direct to simply require a response within the time period specified in the request.

Finally, we would reorganize the provisions of current paragraphs (a) and (b) to improve readability. In so doing, we would, in proposed paragraph (a)(1), authorize the Director of the VA facility to order an autopsy if "required for VA purposes for the following reasons: (i) Completion of official records; or (ii) Advancement of medical knowledge." The current rule is overly broad as it implies that there may be more than two circumstances in which VA may order an autopsy. All autopsy requests fall under

the advancement of medical knowledge or the completion of medical records. This proposed rule would clarify this point. Proposed paragraph (a)(1) would restate the current rule, with the changes noted above.

38 CFR 17.170(d)

Current paragraph (e) states that “[t]he laws of the decedent’s domicile are determinative as to whether the spouse or the next of kin is the proper person to grant permission to perform an autopsy and of the question as to the order of preference among such persons.” We note that readers may have interpreted this sentence to mean that if the decedent dies in a State where the decedent did not reside, we would apply the law of the State where the decedent resided in order to establish the proper person to grant permission for an autopsy. Laws on this issue may vary between States, and it is administratively burdensome—and unnecessary—to require VA medical center directors to determine the decedent’s domicile and then to compare and contrast the laws of the various States that may be involved. In order to avoid potential confusion and administrative difficulties, particularly in autopsy situations where time is usually of the essence, we have determined that the laws of the jurisdiction in which the autopsy would be performed should be used to determine the proper person to grant permission for the autopsy. We propose such a rule in paragraph (d)(1).

The current regulation also describes the typical hierarchy for those who may grant permission for an autopsy, but the language is hortatory and nonbinding (“[u]sually the spouse is first entitled,” etc.). We believe that this is not only unhelpful but is also potentially misleading if it is relied upon by a VA facility director in a State in which this

typical hierarchy is not in fact law. Thus, we would remove this list. This change will emphasize the need for each local VA facility to establish its own local guidance based on the applicable law of the State in which the autopsy will be performed. We also propose to reorganize and clarify the provisions of current paragraph (e) in proposed paragraph (d).

38 CFR 17.170(e).

Under current paragraph (f) the Director of a VA facility “is authorized to cause an autopsy to be performed on a veteran who dies outside of a Department of Veterans Affairs facility while undergoing post-hospital care under the provisions of 38 U.S.C. 1712 and 38 CFR 17.93.” As noted previously, these authorities have been revised. We would amend the regulation accordingly. In addition, current paragraph (f) states that the Director of the VA facility’s authority to order an autopsy also includes authority to furnish transportation of the body at VA expense to the VA facility where the autopsy would be performed. However, an autopsy would not necessarily be performed in a VA facility. VA may use a contract provider to perform the autopsy outside of a VA facility, or utilize a regional autopsy center. We, therefore, propose to state in paragraph (e) that the authority to order an autopsy “also includes transporting the body at VA’s expense to the facility where the autopsy will be performed.”

We also propose to add an authority citation, 38 U.S.C. 501, 1703, and 1710, after § 17. 170.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601- 612. This proposed rule would not cause a significant economic impact on health care providers, suppliers, or entities since only a small portion of the business of such entities concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of §§ 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by

the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this rule are as follows: 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on November 21, 2011, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure; Alcohol abuse; Alcoholism; Claims; Day care; Dental health; Drug abuse; Government contracts; Grant programs-health; Grant programs-Veterans; Health care; Health facilities; Health professions; Health records; Homeless; Mental health programs; Nursing homes; Philippines, Reporting and recordkeeping requirements; Veterans.

Dated: November 29, 2011

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 17 as follows:

PART 17 -- MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.170 by:

- a. Revising paragraph (a).
- b. Removing paragraph (b).
- c. Redesignating paragraph (c) as new paragraph (b) and adding a paragraph heading.
- d. Redesignating paragraph (d) as new paragraph (c) and adding a paragraph heading.
- e. In newly redesignated paragraph (c), removing “paragraph (c)” each time it appears and adding, in its place, “paragraph (b)”.
- d. Redesignating paragraph (e) as new paragraph (d) and revising newly redesignated paragraph (d).
- e. Redesignating paragraph (f) as new paragraph (e) and revising newly redesignated paragraph (e).
- f. Adding an authority citation at the end of the section.

The revisions and addition read as follows:

§ 17.170 Autopsies.

(a) General. (1) Except as otherwise provided in this section, the Director of a VA facility may order an autopsy on a decedent who died while undergoing VA care authorized by § 17.38, “Medical Benefits Package”, or § 17.52, “Hospital care and medical services in non-VA facilities”, if the Director determines that an autopsy is required for VA purposes for the following reasons:

- (i) Completion of official records; or
- (ii) Advancement of medical knowledge.

(2) VA may order an autopsy to be performed only if consent is first obtained under one of the following circumstances:

- (i) Consent is granted by the surviving spouse or next of kin of the decedent;
- (ii) Consent is implied where a known surviving spouse or next of kin does not respond within a specified period of time to VA’s request for permission to conduct an autopsy;
- (iii) Consent is implied where a known surviving spouse or next of kin does not inquire after the well-being of the deceased veteran for a period of at least 6 months before the date of the veteran’s death; or
- (iv) Consent is implied where there is no known surviving spouse or next of kin of the deceased veteran.

(b) Death resulting from crime. * * *

(c) Jurisdiction. * * *

(d) Applicable law. (1) The laws of the state where the autopsy will be performed are to be used to identify the person who is authorized to grant VA permission to perform the autopsy and, if more than one person is identified, the order of precedence among such persons.

(2) When the next of kin, as defined by the laws of the state where the autopsy will be performed, consists of a number of persons such as children, parents, brothers and sisters, etc., permission to perform an autopsy may be accepted when granted by the person in the appropriate class who assumes the right and duty of burial.

(e) Death outside a VA facility. The Director of a VA facility may order an autopsy on a veteran who was undergoing VA care authorized by §§ 17.38 or 17.52, and whose death did not occur in a VA facility. Such authority also includes transporting the body at VA's expense to the facility where the autopsy will be performed, and the return of the body. Consent for the autopsy will be obtained as stated in paragraph (d) of this section. The Director must determine that such autopsy is reasonably required for VA purposes for the following reasons:

- (1) The completion of official records; or
- (2) Advancement of medical knowledge.

(Authority: 38 U.S.C. 501, 1703, 1710)

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